Doxiadis v Triborough Bridge & Tunnel Auth.

2023 NY Slip Op 31996(U)

June 14, 2023

Supreme Court, New York County

Docket Number: Index No. 160739/2017

Judge: James G. Clynes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22M

---X

GEORGE DOXIADIS, Plaintiff,	INDEX NO.	160739/2017
- v -	MOTION DATE	03/31/2023
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, MTA BRIDGES AND TUNNELS, METROPOLITAN TRANSPORTATION AUTHORITY Defendants.	MOTION SEQ. NO.	002
	DECISION + ORDER ON MOTION	

---X

HON. JAMES G. CLYNES:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and following oral argument, the motion is decided as follows:

This action involves a collision between a motorcycle operated by George Doxiadis (plaintiff or Doxiadis) and a white, plastic delineator, which was placed on top of the beginning of a solid white line on the Bronx Whitestone Bridge (the bridge). Plaintiff alleges that, as a result of the accident, he sustained serious injuries, including but not limited to, the fracture and dislocation of his left shoulder, the fracture of the fibula and tibia of the left leg and a tear of the ACL and MCL of the left knee (Verified Bill of Particulars [hereinafter also, BOP]; NYSCEF Doc. No. 25).

Defendants Triborough Bridge and Tunnel Authority, MTA Bridges and Tunnels and Metropolitan Transportation Authority move, pursuant to CPLR 3212 for summary judgment

dismissing the Complaint, or in the alternative dismissing any claims regarding the color and placement of the pylon(s)/delineator(s)/tubular marker(s)[1] with which plaintiff's motorcycle came into contact and striking any such claims from plaintiff's BOP and pursuant to CPLR 3211 (a), including but not limited to CPLR 3211 (a) (7), to dismiss plaintiff's Complaint (Amended Notice of Motion [NYSCEF Doc. No. 72]).

Plaintiff cross-moves, pursuant to CPLR 3212 (c), for summary judgment on liability in all causes of action.[2]

I. Background and Brief Procedural History

At a municipal hearing, plaintiff testified that, on the day of the collision, he was riding his motorcycle with friends (NYSCEF Doc. No. 57 [50-H Hearing dated November 16, 2017 at 33]), including Frank Mylett and Raymond John Metski (NYSCEF Doc. Nos. 76 and 77).

It is undisputed that at the time of the July 27, 2017 accident, plaintiff was driving his motorcycle southbound closer to the Queens side where the bridge ends (defendants' Statement of Material Facts; NYSCEF Doc. No. 53 and plaintiff's Response to Statement of Material Facts; NYSCEF Doc. No. 76).

At some point in time, plaintiff was traveling in the right lane and moved into the middle lane. When he moved from the right to the middle lane, the lanes were separated by dashed white

[1] The parties refer to pylon(s), delineator(s) and tubular marker(s) seemingly interchangeably. For sake of clarity, these terms all refer to the same object(s).

[2] On July 26, 2022, the court marked off defendants' motion for summary judgment and dismissal of the Complaint [motion seq. No. 002] based on defendants' lack of appearance (NYSCEF Doc. No. 92]). The court also granted plaintiff's cross-motion for summary judgment in favor of plaintiff on the issue of liability (*id.*). However, on July 27, 2022, the court vacated its decision based on defendants' representation that counsel was not aware that motion seq. No. 002 was calendared for oral argument on July 26, 2022 (NYSCEF Doc. No. 94).

lines. He remained in the middle lane for a few seconds. When he attempted to change from the middle lane to the left lane prior to the incident, the following ensued:

> "15. As he was in the middle lane, there was another vehicle a couple of car lengths in front of him. Exhibit 10 at 40.
> "16. When plaintiff began to make his attempt to change from the middle lane to the left lane, he observed the dashed white line that separated those two lanes up to the front fender of the car in front of him in the middle lane. Exhibit 10 at 43
> "17. When plaintiff was in the process of merging into the left lane, he noticed a spot on the roadway where the dashed white line changed into something else. Exhibit 10 at 44
> "18. Plaintiff made the observation described in paragraph 17 (above) a split-second before the incident occurred. Exhibit 10 at 44
>
> . . .
>
> "24. Plaintiff saw the pylon at the same moment that he saw the solid white line. Exhibit 10 at 47-48.
> "25. The front of plaintiff's motorcycle hit at least one of the pylons. Exhibit 10 at 52-53.
> "26. When he first saw the pylon and the solid white line, the color of the pylon he saw was white. Exhibit 10 at 51"

(NYSCEF Doc. No. 53).

Plaintiff claims specifically that:

> "[t]he aforementioned pylons were placed on the solid white line in the southbound lanes of traffic as aforementioned immediately at the point where the broken lines ended and merged with the solid white line, without any warning or notice concerning the presence of the pylons on the solid white line"

(Corrected Complaint, ¶ 33; NYSCEF Doc. No. 60).

In his Amended Notice of Claim, plaintiff contends that:

> "The white pylons blended with the white line they were mounted upon, created an illusion, and failed to provide proper color contrast for motorists/cyclists such as petitioner on the descending roadway of said bridge. Said *delineators*/pylons were the wrong color and failed to provide contrast with the white line they were mounted on, and became a danger and obstruction. If *delineators*/pylons were to be used in addition to the white line said pylons should have been in compliance with commonly accepted practices and been orange in color so as to provide proper contrast and differentiation. *Also, said delineators/ pylons were negligently placed and installed.*"

(NYSCEF Doc. No. 56 at 2 [emphasis in the original]).

The alleged negligence here lies in defendants' ownership, operation, management, maintenance, control, supervision and design of the roadway and the markings on its surface together with the negligent placement of the pylons at the beginning of the white solid line without warning of the presence of said pylons (see NYSCEF Doc. Nos. 62 and 80). In particular, plaintiff alleges that defendants violated §§ 6F.65(01), 1A.02(02)(E), 1A.03(01), 1A.04(1), 3H.01(02) and 3H.01(05) of the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD or the Manual) (Supplemental BOP [NYSCEF Doc. No. 69]).

Defendants filed an Answer asserting several affirmative defenses, including, but not limited to, claiming that they have immunity, that plaintiff engaged in culpable conduct causing the alleged damages, that plaintiff did not sustain a serious injury and that the MTA is not a proper party to this action (NYSCEF Doc. No. 3 [Answer]).

Plaintiff deposed Renee Shepherd, TBTA's Regional Director of Bridges South, who oversees the operation and management of the Verrazzano-Narrows Bridge, Marine Parkway Gil-Hodges Memorial Bridge and Cross Bay Veterans Memorial Bridge (NYSCEF Doc. No. 67). During her deposition, she attested that she has been working in Operations at TBTA for 25 years and that her responsibilities include the oversight of traffic management (*id.* at 11-12 and 15).

Shepherd testified that, at the time of the accident, she was the Regional Director of Bridges East, which includes the Bronx-Whitestone and Throgs Neck Bridges (*id.* at 14). She stated that the roadway where the accident occurred is owned and maintained by TBTA (*id.* at 29). Maintenance thereof includes placing road markings, such as white, yellow and striped lines (*id.* at 30).

She further attested during her deposition that TBTA's Operations Mitigation Team made the decision to install delineators in May 2017 at and in the area of the location of plaintiff's accident (Shepherd EBT, ¶¶ 29 and 52; see also NYSCEF Doc. No. 69 [Work Order 394306]). Shepherd explained that the reason why a decision was made to install delineators was that there were several accidents and collisions in that area (*id.* at 47):

> "due to vehicles crossing over between these two lanes, roadway one and roadway two . . . Roadway one is a left exit to the Cross Island Parkway only . . . The other two lanes going to the expressway . . . So this is why, there was a solid line that no one should cross over. So the other things from observations and statements, people cheat in the left lane. Traffic tends to be heavier in roadways two and three which go to the Whitestone Expressway, and so people jump into the far left lane roadway one, ride all the way to the end, and then suddenly cross back over after -- now you are driving and there is a solid line here, but they are cutting over and likewise, and so the decision was made -- we also do enforcement . . . However, we continue to have collisions. So in an effort to reemphasize the do not cross, the solid line was there and delineators were placed in the area to prevent that unsafe and hazardous condition"

(*id.* at 47-49).

In motion seq. No. 001, the court denied plaintiff's motion seeking to compel the production for deposition of the "TBTA Traffic Engineer who participated in the Operations Mitigation Team telephone conference that included TBTA Renee Shepherd concerning the placement of delineators on the southbound Bronx Whitestone Bridge between roadways 1 and 2 from Lamp Pole -2 to the Cross Island split" (NYSCEF Doc. No. 42; decision and order dated February 28, 2020). The court found that:

> "plaintiff fails to even allege that Ms. Shepherd had insufficient knowledge. Rather, plaintiff merely states that a deposition of the engineer is necessary and material. Such statement fails to meet his burden. Ms. Shepherd testified that she participated in weekly telephone calls to discuss the placement of the subject delineator. Furthermore, after oral arguments, it is clear that the individuals, other than Ms. Shepherd, who participated in the weekly conference calls were not always the same. Also, there is no indication that the decision to place the subject delineator on the solid white line was made by an engineer or even that such decision was made on the conference calls, although such was discussed"

(*id.* at 2).

II. Timeliness of Plaintiff's Cross-motion for Summary Judgment

At the outset, the court notes that defendants argue in their reply papers that plaintiff's cross-motion is untimely and may not be considered, pursuant to CPLR 3212(a).

Defendants draw the court's attention to the Case Scheduling Order dated February 15, 2018 (NYSCEF Doc. No. 11), which required summary judgment motions to be made no later than 60 days after the filing of the Note of Issue. Defendants point out that the Note of Issue was filed on October 12, 2021 (NYSCEF Doc. No. 50). They indicate that based on the foregoing, the last day to move would have been Saturday, December 11, 2021, or rather, Monday, December 13, 2021, pursuant to General Construction Law § 25-(a). However, they report that plaintiff filed his cross-motion more than 2 months later, on February 10, 2022 (NYSCEF Doc. No. 73). Defendants claim that plaintiff made no effort to show good cause for the delay and the cross-motion does not seek an extension of time to move for summary judgment.

To further bolster their argument that plaintiff's cross-motion should not be considered on its merits, defendants distinguish the underlying circumstances from *Kershaw v Hospital for Special Surgery*, 114 AD3d 75 (1st Dept 2013). In *Kershaw*, defendants argue that the First Department court specifically and unambiguously rebuked the idea of a cross-motion exception to the rule in *Brill v City of New York* (2 NY3d 648 [2004]). They argue that, even if there was such an exception, the cross-motion specifically at issue in *Kershaw* would not qualify anyway because it was not a true cross-motion as the cross-movant was not seeking relief against the original movant but rather was seeking summary judgment against a non-moving party. Defendants stress that the First Department made it clear that the Court of

Appeals did not intend such an exception, especially not one which relied on precedents which predate *Brill.*

In any event, defendants contend that, even if such an exception exists, it would not apply to this case as plaintiff's case is not "essentially duplicative" of the defendants' (NYSCEF Doc. No. 90 at 4 [Memorandum of Law in Reply]). Defendants point out that plaintiff submits an expert affidavit and deposition transcripts which were not part of the record on the defendants' motion and raise additional arguments and provisions, as well as legal arguments which were not raised in the defendants' motion. They reiterate that plaintiff's cross-motion was made after the deadline set by the court for motions, pursuant to CPLR 3212 and he failed to move for an extension or to set forth a good cause for requesting same.

They add that, in any case, plaintiff's motion fails on its merits as set forth below.

It is well established that no matter how meritorious or unprejudicial a summary judgment motion may be, it cannot be considered, or granted, if good cause for its late filing is not satisfactorily explained (*Brill*, 2 NY3d at 652).

Here, as permitted by CPLR 3212(a), the court issued a scheduling order setting a time restriction for the filing of summary judgment motions, requiring dispositive motions to be filed no later than 60 days from the note of issue (*Appleyard v Tigges*, 171 AD3d 534, 535-536 [1st Dept 2019]). The purpose of such orders is to move cases and control the court's calendars and such "court-ordered time frames" must be adhered to by the parties (*Miceli v. State Farm Mut. Auto Ins. Co.*, 3 NY3d 725, 726 [2004], citing *Brill*, 2 NY3d 648).

It is undisputed that plaintiff did not file his motion within the requisite 60 days specified in the order. Furthermore, plaintiff failed to show a good cause for his tardiness. Accordingly, that branch of plaintiff's cross motion seeking summary judgment will not be

considered on its merits (*Cullity v Posner*,143 AD3d 513, 514 [1st Dept 2016] [the moving party's "failure to address the missed filing deadline or offer, let alone show, good cause for the delay in filing, is fatal to their motion (see *Rahman v Domber*, 45 AD3d 497, 497 (1st Dept 2007)]").

III. Standard of Review

The principle is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). However, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad*, 64 NY2d at 853; *People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]).

"[O]n a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*id.*). "Dismissal

of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [internal citation omitted]).

IV. Failure to State a Cognizable Cause of Action against Defendant MTA

A. Contentions

Defendants argue that the MTA is not a proper party to this action as a matter of law. The MTA was created, pursuant to New York Public Authorities Law (N.Y. Pub. Auth. L.) § 1263. They cite to N.Y. Pub. Auth. L.§ 1264 (2) which states that the MTA "shall be regarded as performing an essential government function in carrying out its purposes and in exercising the powers granted by this title."

Defendants rely on *Noonan v Long Is. R. R.* and *Cusick v Lutheran Med. Ctr.* and a string of cases cited by that court for the proposition that the functions of the MTA with respect to public transportation are limited to financing and planning and do not include the operation, maintenance, control or any facility (158 AD2d 392 [1st Dept 1990] and 105 AD2d 681 [2d Dept 1984], citing *Wenthen v Metropolitan Transp. Auth.*, 95 AD2d 852 [2d Dept 1983]; *Bujosa v Metropolitan Transp. Auth.*, 44 AD2d 849 [2d Dept 1974]; *Matter of Abrams v New York City Tr. Auth.*, 48 AD2d 69 [1st Dept 1975] and *Prinz v City of New York*, 98 Misc 2d 952 [Sup Ct, NY County 1979]).

In opposition, plaintiff argues that he stated a claim against the MTA. He reiterates that the Complaint alleges that the MTA "through its agents, servants, permittees, contractors and/or employees," maintained, managed, or controlled the Bronx Whitestone Bridge, including the design of the pavement markings and appurtenances, when Mr. Doxiadis had his collision

(NYSCEF Doc. No. 2, ¶¶ 17, 20, 23 and 26). In addition, plaintiff also alleges that the MTA failed its duty to properly mark the roadway (Complaint, ¶ 36, 39), which caused his injuries (Complaint, ¶ 51).

Plaintiff argues that defendants do not offer any evidence in support of their affirmative defense that the MTA is not a proper party to this action as a matter of law. Plaintiff contends that the case law cited by defendants fails to support their assertion.

First, plaintiff argues that *Cusick*, a medical malpractice case, did not involve dismissal under CPRL 3211 and the court granted the MTA summary judgment, not dismissal, based on the functions of the MTA with respect to public transportation. Furthermore, he contends that the other four decisions relied upon by defendants were string-cited in *Cusick* but none support dismissal here either.

Regarding *Wenthen* and similarly in *Bujosa*, plaintiff claims that the court granted the MTA dismissal rather than summary judgment, but only because plaintiff was improperly seeking to recover damages from the MTA for the alleged negligence of the Long Island Rail Road (LIRR), which is a subsidiary and separate legal entity for the purposes of the pertinent lawsuits. In contrast, plaintiff stresses that he unambiguously stated a claim in this case against the MTA for its alleged negligence in the ownership, management, and control of the bridge.

Turning to *Matter of Abrams*, which involved an Article 78 proceeding to compel respondents to do something about the noise in the subways, plaintiff argues that the First Department affirmed the dismissal only because petitioners lacked standing. Furthermore, plaintiff underscores that the court mentioned that the MTA "is not a proper party to this proceeding as it is an independent public authority without responsibility for excessive subway noises" (48 AD2d at 74). Therefore, plaintiff argues that nothing in this decision vitiates

plaintiff's allegations that the MTA owned, managed, or controlled the Bronx Whitestone Bridge, or that it negligently installed the delineators that he struck.

Finally, in *Prinz*, a wrongful death action arising from a murder in a passageway near a subway station, plaintiff contends that the court granted NYCTA and MTA summary judgment since no showing was made that these defendants had any responsibility for the area in which the murder occurred (98 Misc 2d at 952). Plaintiff alleges that it appears that the motion was converted from a CPLR 3211(a)(7) and 3211(c) motion to a summary judgment motion. However, plaintiff contends that it was granted based on MTA's statement as to its functions after plaintiff offered no evidence to rebut this statement (*id.*).

In reply, defendants stress that the MTA should not be a party to the case. They point out that it was agreed that TBTA made the decision to place the subject delineators. Thus, defendants argue that if the MTA is no longer in the case, plaintiff's claims are not affected. They further state that if summary judgment is granted on substantive grounds, there would be no basis for a claim against either defendant.

Defendants highlight that they moved to remove the MTA from the case either through dismissal or summary judgment. They argue that the cases they cited, namely *Cusick* and *Wenthen*, justified either theory of relief, whether dismissal or summary judgment.

They underscore that it is impossible to plead allegations based on the alleged negligent "operation, maintenance and control" of a facility that adequately make out a cause of action against the MTA because the case law says that the MTA is not responsible for same. They state that, similarly, since the cases say the MTA is not responsible for same, any such claim must fail as a matter of law on summary judgment. Defendants point out that this is not an issue of

whether the pleadings are specific enough, the MTA simply cannot be liable for what the plaintiff is alleging it did.

Defendants reiterate that plaintiff's focus on the mechanism for the requested relief is misplaced and irrelevant. They argue that both are appropriate.

Defendants contend that plaintiff admits that *Cusick* resulted in the MTA being let out of the case because of MTA's functions with respect to public transportation. Defendants compare the underlying case to *Wenthen* where allegations were also lodged against a separate legal entity, the TBTA. They stress that the MTA cannot be held negligent for the maintenance of a facility, and it is unambiguous that the TBTA made the decision to place the subject delineators and that there is no evidence of the MTA's involvement.

They argue that like in *Bujosa*, plaintiff sought recovery for the alleged negligence of a separate entity, namely the LIRR in *Bujosa* and the TBTA in the underlying case, respectively. Like, in *Prinz*, they contend, there is no evidence of the MTA's involvement according to defendants.

Defendants underscore that plaintiff's allegations surround the alleged actions or inactions of the TBTA, not the MTA.

B. Analysis

In their Answer, defendants interposed the affirmative defense that the MTA is not a proper party to this action and that plaintiff fails to set forth a cause of action upon which relief may be granted against it (NYSCEF Doc. No. 3 at 7).

"The MTA is a public benefit corporation created to oversee the mass transportation systems in New York City as well as commuter transportation and related services within the metropolitan commuter transportation district (see MTA Act, Public Authorities Law §§ 1260--

1279-b)" (*Matter of New York Pub. Interest Research Group Straphangers Campaign v Metropolitan Transp. Auth.*, 309 AD2d 127, 134 [1st Dept 2003]).

The MTA functions as an umbrella organization for eight operating agencies which are MTA-affiliated public benefit corporations subject to their own statute, as well as certain provisions of the MTA Act (*id.*). The TBTA is one such affiliated entity under the statute (N.Y. Pub. Auth. L. §1266 [6-a] [Special powers of the authority] and §§ 550-571 [Triborough Bridge and Tunnel Authority]). More specifically, whereas "[t]he MTA is comprised of 'subsidiary units' and 'component units,' the TBTA is considered a component part of the MTA, "which operates toll bridges and tunnels as well as a parking garage and the New York Coliseum" (*Greene v Long Island R. Co.*, 99 F Supp 2d 268, 273 [EDNY 2000]).

By way of background, the Legislature created public corporations, such as the TBTA, for the construction, maintenance and operation of various highways and bridges in the state. According to Pub. Auth. L. §553 [Powers of the authority], the TBTA, has the power:

> "To acquire, design, construct, maintain, operate, improve and reconstruct, so long as its corporate existence shall continue, the following projects, . . .
> "(b) a bridge heretofore constructed, known as Bronx-Whitestone bridge, over the East river from a point at or near Whitestone in the borough of Queens to the borough of the Bronx, together with approaches to such bridge (herein collectively referred to as the "Whitestone bridge project")"

Both *Cusick* and *Noonan* involve claims based on negligence dismissed by the court where it was held that an action which alleges negligence in improper operation, maintenance and control of facilities owned by a subsidiary corporation cannot be sustained against the MTA. The MTA may not be held liable for torts committed by a subsidiary arising out of the operations of said affiliated entity. Rather, the courts found that the proper responsible party was the local transportation provider and not the MTA, namely, the NYCTA in *Noonan* and the LIRR, in *Cusick*.

The First Department continues to hold this position as it rules that "[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility" (*Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007], quoting *Cusick*, 105 AD2d at 681).

In this context, the MTA has successfully claimed that it has no control over or responsibility for the daily operation, maintenance, and control of the facilities of its affiliated entities and that it may not generally be held liable for their torts.

As such, the controlling statutes and case law conclusively demonstrate that the MTA is not a proper party to this lawsuit. Allegations by the plaintiff that the MTA owned, controlled and maintained the bridge are nothing more than bare legal conclusions. Accordingly, that branch of defendants' motion to dismiss the Complaint as to the MTA is granted.

V. The Color of Pylons/Delineators/Tubular Markers

Turning to the parties' contentions, the court notes that defendants argue that the coloring of the pylons at the subject location is specifically authorized by law. They state that, pursuant to Vehicle Traffic Law § 1680, the (National) Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD or the Manual) and its specifications are adopted as the state standard for traffic control devices on any street, highway, or bicycle way open to public travel.

Defendants refer the court to the purported applicable standard, namely, MUTCD § 3H [CHANNELIZING DEVICES USED FOR EMPHASIS OF PAVEMENT MARKING PATTERNS],[3] which reads in relevant part:

[3] PART 3 [MARKINGS];

"**Section 3H.01 Channelizing Devices**

"Option:

"01 Channelizing devices, as described in Sections 6F.63 through 6F.73, and 6F.75, and as shown in Figure 6F-7, such as cones, tubular markers, vertical panels, drums, lane separators, and raised islands, may be used for general traffic control purposes such as adding emphasis to reversible lane delineation, channelizing lines, or islands. Channelizing devices may also be used along a center line to preclude turns or along lane lines to preclude lane changing, as determined by engineering judgment.

"**Standard:**

. . .

"03 **The color of channelizing devices used outside of temporary traffic control zones shall be either orange or the same color as the pavement marking that they supplement, or for which they are substituted**"

(https://mutcd.fhwa.dot.gov/pdfs/2009r1r2r3/part3.pdf, last visited on 4/25/2023 [emphasis in the original]).

Defendants argue that, as set forth above, the Manual allows for the color of channelizing devices, including tubular markers, such as the ones used at the location of the accident, to be the same color as the pavement marking they supplement or orange as long as they are outside of a temporary traffic control zone.

Next, defendants make the argument that the location at issue was not a Temporary Traffic Control (TTC) zone as suggested by plaintiff. To demonstrate their point, defendants quote MUTCD § 6A.01 (03) [General][4]:

"When the normal function of the roadway, or a private road open to public travel, is suspended, TTC planning provides for continuity of the movement of motor vehicle, bicycle, and pedestrian traffic (including accessible passage); transit operations; and access (and accessibility) to property and utilities"

They stress that it was neither a "work zone," "incident zone," or "planned special event" as defined by MUTCD § 6C.02 (02), (03) and (04), respectively.[5]

[4] PART 6 [TEMPORARY TRAFFIC CONTROL]: CHAPTER 6A [GENERAL].

[5] Chapter 6C [TEMPORARY TRAFFIC CONTROL ELEMENTS]

Section 6C.02 (01) [**Temporary Traffic Control Zones**]

"Support:
"01 A TTC zone is an area of a highway where road user conditions are changed because of a work zone, an incident zone, or a planned special event through the use of TTC devices, uniformed law enforcement officers, or other authorized personnel"

Defendants point out that Shepherd testified that the delineators were placed at the location as a way to emphasize the solid white line to reduce the danger caused by individuals crossing the solid white line and accidents resulting therefrom (Shepherd EBT at 47-48 and 5-56). They underscore that this is the scenario envisioned by MUTCD § 3H.01 [Channelizing Devices] and that MUTCD Chapter 6 F [TEMPORARY TRAFFIC CONTROL ZONE DEVICES] and Section 6F.65 [**Tubular Markers**] cited by plaintiff in his Supplemental Bill of Particulars are not applicable to this case.

In particular, defendants explain that MUTCD § 3H.01 specifically discusses the allowable colors for channelizing devices, such as the tubular markers outside TTC zones, such as the location of the incident, and is therefore controlling in this case regarding the allowable color of the tubular markers/pylons involved in this incident.

Defendants point out that the parties agree that there was a white pylon positioned on a solid white line at the location of the accident (Moving papers, exhibit 10 at 45 and 51 [Plaintiff's EBT]). They argue that the use of white pylons at that location, as specifically permitted by MUTCD Section 3H, is therefore not negligent as a matter of law, contrary to plaintiff's arguments to the contrary. As such, they seek the dismissal of plaintiff's arguments regarding the color of the pylons used.

To further bolster their theory that plaintiff's allegations regarding the color of the pylons warrant dismissal, defendants make the separate argument that the coloring of the

pylons at the subject location was not a proximate cause of the incident as a matter of law. They contend that the accident would have occurred regardless of the color of the pylons.

Defendants refer the court to plaintiff's testimony that he never looked at the spot of the pylon until it was too late, rather than looked at the spot and failed to see it. They stress that plaintiff saw the solid line at the same time as he saw the pylon. Defendants point out that the color of the pylon never caused the plaintiff to fail to see it or the line. Rather, they argue that what is relevant here is that the first time he saw the spot on the roadway, he saw the solid line and the pylon. Based on the foregoing, defendants argue that the color of the pylon was not a proximate cause of the incident and thus, any claims pertaining to the color of the pylon should be dismissed.

In reply, defendants point out that plaintiff's responsive papers appear to abandon the argument regarding the coloring of the pylons. They state that plaintiff does not discuss the coloring of the pylons or claim that the coloring was inappropriate and does not attempt to refute the defendants' legal arguments on that topic. Defendants claim that, as a result, their arguments are uncontroverted and that they should be credited by the court. They further contend that the court should credit their arguments and that the case should be dismissed in its totality. In the alternative, even if the court declines to grant summary judgment and dismiss the case in its totality, summary judgment should be granted as to any claims regarding the coloring of the pylons and such arguments should be dismissed and stricken from plaintiff's Bill of Particulars.

As pointed out by defendants in their reply, plaintiff does not address the question of the coloring of the pylons in his opposition papers. Although plaintiff claimed in his initiating papers that defendants mounted and installed delineators/pylons of the wrong color, he did not

set forth an analysis in support of this theory in his submissions. As such, the court deems plaintiff's claims pertaining to the coloring of the delineators/pylons/tubular markers abandoned in light of his failure to discuss them in his opposition. Accordingly, this claim is dismissed from the Complaint and stricken from the Bill of Particulars and Supplemental Bill of Particulars.

VI. The Placement of Pylons/Delineator/Tubular Markers

A. Contentions

First, defendants argue that they are entitled to qualified immunity as to the placement of pylons. They rely on case law for the proposition that government officials and entities benefit from qualified immunity in regard to claims sounding in negligent traffic planning unless the study is plainly inadequate or there is no reasonable basis for its plan.

They contend that, here, the decision to place the pylons on the roadway where this accident occurred was considered, studied, and was the result of a deliberate decision-making process which meets TBTA's prima facie burden to show its entitlement to immunity in this case.

At her deposition, Shepherd testified that the decision was made by the Operations Mitigation Team, which was constituted of:

> "myself, operations superintendent, maintenance superintendents of bridges east [sic] ... and the engineering department, traffic engineering. As well as these ideas and actions were also discussed in a weekly phone call that included all of the facilities, vice-president of operations, chief maintenance officer, vice-president of maintenance, deputy chief engineer and sometimes president"

(NYSCEF Doc. No. 67 at 46-47).

Turning to the rationale behind the placement, Shepherd stated that the reason that the delineators were placed was due to accidents in the area because of people crossing between the

middle and left lane (*id.* at 47-48). Defendants state that there continued to be accidents even with the solid white line "so in an effort to reemphasize the do not cross" delineators were placed (*id.* at 48-49).

They explain that Shepherd gave testimony that the TBTA had studied the area, reviewed accidents and analyzed causes, root causes, remedies and mitigation. They added that Shepherd said that consideration was given to several issues including that vehicles (including motorcycles) would come into contact with the delineators, the past experience and use of delineation through the Authority, the material the delineator is made of and that it has a spring and will give if struck, and records of accidents and collisions. (Moving papers, exhibit 12 at 46-49; 55-59 [NYSCEF Doc. No. 67]).

Turning to the rationale behind the placement, Shepherd stated that the reason that the delineators were placed was due to accidents in the area because of people crossing between the middle and left lane (*id.* at 47-48). Defendants state that there continued to be accidents even with the solid white line "so in an effort to reemphasize the do not cross" delineators were placed (*id.* at 48-49).

In response to the question whether any studies had been done with regard to the difference of motor vehicles versus motorcycles striking the delineators, she testified that they relied on:

> "Past experience and the use of delineation throughout the Authority. It is made of plastic/ There is not a curb. If you strike that delineator it gives. It has a spring. There was consideration given to this delineation being placed in the roadway similar to other places. However, there was not any, any real overall concern about it because they give and it is not a curb. There is nothing – it is roadway and the sticks gives"

(*id.* at 56-57).

Defendants point out that Shepherd also testified that they "have used these [delineators] in other areas and they are hit or run over all the time by trucks, by cars, by buses, by motorcycles. So there was consideration given to that and it was not found to be . . . unsafe" (*id.* at 58.). She also indicated that accidents and collisions were considered in the discussions (*id.* at 59).

Second, defendants argue that the placement of the pylons on the solid white line is specifically authorized by law. They underscore that if the court agrees that qualified immunity applies then it need not consider this argument, which independently justifies summary judgment on the issue of the placement of the delineators.

Defendants, again, refer the court to MUTCD §3H.01(02) which allows for channelizing devices, such as tubular markers to be used "along lane lines to preclude lane changing, as determined by engineering judgment." Defendants stress that this is exactly how the pylons were being used in this case. They cite again Shepherd's testimony who indicated that the pylons were placed after study "in an effort to reemphasize the do not cross, the solid line was there and delineators were placed in the area to prevent that unsafe and hazardous condition" (Moving papers, exhibit 12 at 48-49; see also 46-58 [NYSCEF Doc. No. 67]).

Defendants state that plaintiff seems to argue that there was not sufficient warning that there would be a pylon on the white line, but they argue that the pylon and the white line were the warning. They stress that the solid white line was to discourage people from crossing the line because people crossing the line were creating danger.

Defendants refer the court to VTL § 1128(a), which states:

> "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety"

They argue that this statute coupled with the MUTCD reveals a logic to the allowance of the pylon placement. They stress that the solid white line is the warning not to change lanes at that location. They add that it was determined that the solid white line should be emphasized in this case to prevent danger. The MUTCD recognizes that this may be necessary and specifically allows for it. There is no requirement of any warning. Drivers are supposed to follow the law and to do so they must observe where they are going when a lane change is attempted.

Defendants stress that why plaintiff's accident occurred, and whether plaintiff may have caused it himself through his own negligence despite the TBTA following the MUTCD, are not relevant to this motion. The question is whether the TBTA was permitted to place the pylon where it did, which they argue was established.

In opposition, plaintiff argues that defendants do not deserve qualified immunity because the discussion that Shepherd testified to cannot be considered a study. They point out that she admitted that there were no minutes or other written record of the conference call (Shepherd EBT at 58-59); that the participants in the discussion relied on "past experience" (*id.* at 56-57) rather than actual data on accidents at the scene and that she made no mention of the MUTCD provisions governing such delineators. Thus, he contends that this informal conversation cannot constitute "deliberate governmental decision-making." Secondly, plaintiff claims that Shepherd's team never considered the risk of a collision like plaintiff's. Namely, Shepherd testified that "there was not any, any real overall concern about it because [the delineators] give and it is not a curb" (*id.* at 57). He underscores that she did not say that the team considered whether the delineators would catch a motorcycle's handlebars as plaintiff's

motorcycle riding friend, Frank Mylett, testified happened to plaintiff (see NYSCEF Doc. No. 78 at 35).

Plaintiff relies on case law for his argument that defendants could not prove without any expert engineering opinion prima facie that their placement of these delineators was not negligent. Turning to defendants' reliance on MUTCD § 3H.01, he highlights its language which requires that placement be "determined by engineering judgment," which was absent here.

To illustrate his point, plaintiff states that defendants objected to his Combined Demands and never produced anything responsive (NYSCEF Doc. No. 80 [Defendants' Response to Combined Demands; Response to Notice for Discovery and Inspection Dated January 12, 2018 and Supplemental Response to Notice for Discovery and Inspection Dated January 12, 2018]). Plaintiff also refers to the language in the decision dated February 28, 2020 (motion seq. No. 001) to highlight that the court found that "there is no indication that the decision to place the subject delineator on the solid white line was made by an engineer or even that such decision was made on the conference calls, although such was discussed" (NYSCEF Doc. No. 42 at 2).

In further support of his argument, plaintiff submits an "unrebutted" expert affidavit by professional engineer, Nicholas Bellizzi, PE (hereinafter also, Bellizzi), who indicates that his areas of expertise are forensic engineering, civil engineering, highway engineering and traffic engineering and that he has previously testified in court as a forensic engineer, collision and accident reconstructionist and in the areas of highway design, maintenance and safety engineering and traffic engineering (NYSCEF Doc. No. 81). Bellizzi also states that he has

extensive experience in the use of the federal (National) MUTCD, the current NYSDOT MUTCD Supplement, and the former NYSDOT MUTCD, which was in effect prior to 2011.

In his affidavit, plaintiff's expert provides professional opinions on the standard of care, on the departures by defendants, on causation and a rebuttal of defendants' arguments.

With regards to the question of standard of care for defendants' placement of delineators, Bellizzi relies on VTL § 1680, which was adopted by reference in 23 CFR Part 655. He relies on MUTCD §§ 1A.02 (02) [Principles of Traffic Control Devices][6] and 1A.03 (01) [Design of Traffic Control Devices][7] and 1A.04 (01) [Placement and Operation of Traffic Control Devices][8], 3H.01 (02) and (05) [Channelizing Devices][9] and 6F.65 (01) [Tubular Markers].[10]

---

[6] "*Guidance:*
"*02 To be effective, a traffic control device should meet five basic requirements:*
A. Fulfill a need;
B. Command attention;
C. Convey a clear, simple meaning;
D. Command respect from road users; and
E. Give adequate time for proper response" [italics in the original, https://mutcd.fhwa.dot.gov/pdfs/2009r1r2r3/part1.pdf (last visited on 4/27/2023)]
[7] "*Guidance:*
"*01 Devices should be designed so that features such as size, shape, color, composition, lighting or retroreflection, and contrast are combined to draw attention to the devices; that size, shape, color, and simplicity of message combine to produce a clear meaning; that legibility and size combine with placement to permit adequate time for response; and that uniformity, size, legibility, and reasonableness of the message combine to command respect*" [italics in the original, https://mutcd.fhwa.dot.gov/pdfs/2009r1r2r3/part1.pdf (last visited on 4/27/2023)]
[8] "*Guidance:*
"*01 Placement of a traffic control device should be within the road user's view so that adequate visibility is provided. To aid in conveying the proper meaning, the traffic control device should be appropriately positioned with respect to the location, object, or situation to which it applies. The location and legibility of the traffic control device should be such that a road user has adequate time to make the proper response in both day and night conditions*" [italics in the original, https://mutcd.fhwa.dot.gov/pdfs/2009r1r2r3/part1.pdf (last visited on 4/27/2023)]
[9] "02 **Except for color, the design of channelizing devices, including but not limited to retroreflectivity, minimum dimensions, and mounting height, shall comply with the provisions of Chapter 6F.**
"05 *Channelizing devices should be kept clean and bright to maximize target value*"
[bold and italics in the original, https://mutcd.fhwa.dot.gov/pdfs/2009r1r2r3/part1.pdf (last visited on 4/27/2023)]
[10] "**Standard:**
"**01 Tubular markers (see Figure 6F-7) shall be predominantly orange and shall be not less than 18 inches high and 2 inches wide facing road users. They shall be made of a material that can be struck without causing damage to the impacting vehicle**" [bold in the original, https://mutcd.fhwa.dot.gov/pdfs/2009r1r2r3/part1.pdf (last visited on 4/27/2023)]

Bellizzi states that the New York State Supplement to the Manual on Uniform Traffic Control Devices (2009 Edition), which has been in effect since March 16, 2011 contains no provisions conflicting with the MUTCD provisions quoted above.

In addition, Bellizzi also contends that the standard of care incorporates the "forgiving highway" principle of highway design under which highway engineers should try to provide safer roadsides for out-of-control (errant) vehicles and to reduce hazards through the following techniques: removing hazardous fixed objects when possible; relocating fixed objects farther from the road; modifying highway hardware with "breakaway" features; and shielding fixed objects with highway barriers. Finally, he states that it is his professional opinion that the standard of care here required a study and written report by a licensed professional engineer with respect to the proposed installation of these delineators and the applicable provisions of the MUTCD.

Bellizzi states that, in his opinion, defendants departed from good and accepted safe engineering practice for the following reasons. He opines that their departures include installing tubular markers that were not made of a material that can be struck without causing damage to the impacting vehicle, contrary to MUTCD §§ 3H.01 and 6F.65 (01) and placing these tubular markers at the start of the solid line, which did not give adequate time for proper response by road users as required by MUTCD §§ 1A.02 (02) [Principles of Traffic Control Devices] and 1A.03 (01) [Design of Traffic Control Devices] and 1A.04 (01) [Placement and Operation of Traffic Control Devices]. He contends that the material and placement of these delineators contravene the "forgiving highway" principle as they constitute hazardous fixed objects that made the roadway less safe for road users, especially the two-wheel vehicles, such as motorcycles.

He further opines that the "discussions" held by the Operations Management Team about these delineators, as testified by Shepherd, constitute another departure from the standard of care in that they did not involve a licensed professional engineer; they reviewed no actual data about collisions at this location; they did not document their analysis; and they did not consider the risk of a collision like plaintiff's where the delineators caught his motorcycle's handlebars and caused him to fall to the roadway.

Bellizzi states that, in his opinion, the failure to conduct a proper engineering study before installing the delineators was a substantial factor in plaintiff's collision as it would have shown that the material and location of the delineators all presented an increased risk of a collision like plaintiff's; the placement described above was a substantial factor in plaintiff's collision as their placement gave plaintiff less time, distance, and opportunity to complete his lane change before reaching the delineators; and that the material used was also a substantial factor as it would not have caused plaintiff's motorcycle to fall had it not been so unforgiving.

Finally, Bellizzi rebuts defendants' argument that they are protected by qualified immunity on the basis that the placement of the delineators was the result of a deliberate decision-making process by arguing that "nothing about the discussions to which Ms. Shepherd testified constituted a proper engineering study or a 'deliberate decision-making process'" (NYSCEF Doc. No. 8). He further states that, contrary to defendants' argument that the placement of the delineators is proper under MUTCD § 3H.01 (02), which permits placement "along a center line . . . as determined by engineering judgment," the delineators were placed in a lane line, not a centerline and the placement was not based upon engineering judgment.

In reply, defendants reiterate that they made two arguments as to why the placement of the pylons were proper as a matter of law, including that qualified immunity applied to the

decision to place the pylons where they were placed and that the MUTCD authorized the placement of the pylons where they were placed.

In further opposition to the cross-motion, defendants argue that plaintiff did not counter the second argument or challenge the applicability of MUTCD §3H.01. As such, defendants contend that they are entitled to summary judgment on the basis that the placement of the pylons was authorized by law. Defendants, notwithstanding the foregoing, counter plaintiff's expert opinion by underscoring that he does not provide authority challenging the fact that MUTCD supports the placement of the delineators.

They argue that Bellizzi essentially ignores or misinterprets the law to justify the conclusions reached. Specifically, they point out that he cites to general standards, not mandates and to MUTCD language (MUTCD §§1A.02[02] and 1A.03[01]) which appears in italics, which indicates that it is advice. They also refer the court to the language in MUTCD 3H.01(01) to challenge Bellizzi's misguided opinion that delineators cannot be placed in a lane line.[11] With regards the question of material, they state that the only MUTCD provision that uses such language is one that applies only to TTC zones, which the location of the accident was not and allows for material that "can" be struck without causing damage, not that they must be made of a material that cannot ever cause damage. They mention again Shepherd's testimony about the delineators having been designed to be flexible and that they are made of plastic and TBTA's prior experience that they can be struck without causing damage. They conclude that the fact that plaintiff was dislodged from his motorcycle after colliding with the

[11] "Channelizing devices may also be used along a center line to preclude turns or along lane lines to preclude lane changing, as determined by engineering judgment"

delineator does not show that the delineator is not made of a material that can be struck without causing damage.

Next, defendants refute plaintiff's assertions that an engineer did not make the decision to place the delineators and the baseless suggestion that engineers were not consulted and did not participate in the decision. They object to plaintiff's use of testimony and of the court's decision out of context. Defendants stress that engineers were consulted and participated in the determination to place the pylons and that they are entitled to qualified immunity. They refer the court to Shepherd's deposition (NYSCEF Doc. No. 67 at 46) where she testified for the TBTA that it was the Operations Mitigation Team's decision to install delineators in the area. Defendants relate that the team included Shepherd, the Operations Superintendent, Maintenance Superintendents of Bridges East, and the Engineering Department, Traffic Engineering (*id.*). In addition, defendants claim that these ideas were also discussed in a weekly phone call that included all of the facilities, vice-president of operations, chief maintenance officer, vice-president of maintenance, deputy chief engineer and sometimes the president, as well as others (*id.* at 46-47). Therefore, defendants point out that not only the Engineering Department and Traffic Engineering, which was on the Operations Team, would have been part of the decision-making process, but there was also a weekly phone call on which the decision was not necessarily made but was certainly discussed, and one of the attendees on these calls was a deputy chief engineer.

Defendants refer the court to the decision denying plaintiff's motion to compel the production at a deposition of the TBTA Traffic Engineer who participated in the Operations Mitigation Team telephone conference that included TBTA Shepherd concerning the placement of the *relevant* delineators (NYSCEF Doc. No. 42). According to defendants, the

record shows that there were no records concerning on which phone call that issue was discussed, or who participated in a particular phone call meeting; that the Operations Mitigation Team made the decision to place the delineators; that it was never established that such decision was made on one of these weekly calls, despite the issue having been discussed; that, still, the evidence shows that Shepherd was on the Operations Mitigation Team and participated in the relevant phone call(s). Thus, plaintiff had not established his entitlement to a deposition of an engineer, a second person in the decision-making process, when he already had the opportunity to depose one person and chose not to seek any information within the engineering field that she was not qualified to answer. Defendants highlight that the court found that plaintiff had not met his burden to obtain the deposition. In conclusion, they argue that it has been demonstrated that engineering judgment was considered in the decision.

Finally, they argue that plaintiff sets forth a series of false requirements for the applicability of immunity with no support. They stress that the prescribed test has been satisfied and that they considered the same questions at issue in this case, namely whether it was reasonably safe to vehicular drivers with both two and four wheels to place the delineators at that location, even considering the possibility of potential contact between a vehicle and the delineators. They challenge plaintiff's analysis pertaining to the question of risk by stating that, contrary to the cases cited by plaintiff, there is substantial testimony about the subject specific consideration, i.e., Shepherd's testimony regarding consideration given to the safety of the roadway and the placement of the delineators for the vehicles, including the motorcycles. Defendants then turn to the question of sufficiency of the deliberative process regarding the question of "whether the delineators would catch a motorcycle's handlebars." They underscore that this is not the question of risk involved in this case as it was not a theory advanced by

plaintiff and plaintiff does not cite any provisions of the MUTCD in support thereof. Rather, plaintiff's theories surround the color and placement of the delineator, which were specifically considered by the TBTA. In addition, Shepherd indicated that the risk of motorcycles coming into contact with a delineator was considered and she was not asked questions specific to handlebars getting caught because that was never part of plaintiff's case. Finally, plaintiff did not testify that the delineator caught his handlebars. They argue that Mylett's deposition testimony cannot be considered as it was submitted for the first time in support of the plaintiff's late summary judgment motion, and it is not in admissible form as it is not signed.

B. Analysis

Defendants did not make out a prima facie burden on the issue of qualified immunity for the following reasons.

A government body has a nondelegable duty to adequately design, construct and maintain its roadways in a reasonably safe condition (*Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 59 [1st Dept 2006], citing *Friedman v State of New York*, 67 NY2d 271 [1986]; see also *Weiss v Fote*, 7 NY2d 579, 584 [1960]). "However, a governmental body is accorded a qualified immunity from liability arising out of a highway safety planning decision unless its study of a traffic condition is plainly inadequate, or there is no reasonable basis for its traffic plan" (*Affleck v Buckley*, 276 AD2d 507, 508 [2d Dept 2000], citing *Friedman*, 67 NY2d at 284 [additional internal citations omitted]; *Weiss,* 7 NY2d at 589 [liability of a government entity for an injury arising out of a negligent highway safety plan is only "predicated on proof that the plan either was evolved without adequate study or lacked reasonable basis"]).

The rationale behind the doctrine of qualified immunity:

> "arises out of the need to place proper limits on intrusions into the planning and decision-making function of a governmental body. 'To accept a jury's verdict as to the

> reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in expert hands what the Legislature has seen fit to entrust to experts'"

(*Schuster v McDonald*, 263 AD2d 473, 474 [1st Dept 1999], quoting *Weiss*, 7 NY2d at 585-586; see also *Friedman*, 67 NY2d at 283).

The underlying required deliberative process involves the "expertise of qualified employees" (*Friedman*, 67 NY2d at 285]. Indeed, to establish entitlement to qualified immunity in the field of traffic design engineering, defendants must show that "a public planning body considered and passed upon the same question of risk as would go to a jury in the case at issue (see *Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 673 [1999])" (*Jackson v New York City Tr. Auth.*, 30 AD3d 289, 290 [1st Dept 2006] [the Appellate Division found that the Transit Authority's Director of Research and Development's affidavits "failed to definitively establish as a matter of law that the required type of specific, focused consideration was given, and formal decision made, regarding whether the design of the particular buses in question included sufficient places for passengers to grab for balance if necessary" (*id.* at 291)]; see also *Turturro v City of New York*, 28 NY3d 469, 480 [2016]).

Thus, the applicable case law points to the need for more robust evidence than the proffered statements about phone conferences and generalized references to past studies and discussions to support entitlement to qualified immunity warranting dismissal of plaintiff's claims. Defendants provide no specificity as to the dates of these calls nor do they specify the duration or dates the studies were rendered, the name of the studies or who conducted them and their scope or what they addressed, much less a copy or excerpts of same, which would help determine whether they confer upon them immunity from liability to the plaintiff (see *Ernest*, 93 NY2d at 673-674:

["the County conducted a 'sight distance' study to determine how close motorists had to be to the school's driveway to see exiting vehicles. As a result, the speed limit was reduced from 55 to 30 miles per hour. The County might therefore have acquired qualified immunity from liability arising from an automobile accident involving a motor vehicle exiting the school driveway. The County concedes, however, as the Appellate Division found, that the 1983 study 'did not address schoolchildren crossing Westbury road in the vicinity of the school' (251 AD2d, at 994). Thus, the 1983 study does not confer upon the County any immunity from liability to plaintiff, a pedestrian schoolchild crossing Westbury road walking away from the school. Indeed, the County received the notice regarding the danger to walking children after the 1983 study. Thus, there was evidence that the County ignored warnings given after the 1983 study disclosing a different risk to children than was addressed in that study. Disregard of those later warnings could afford a basis for liability"]).

As such, defendants failed to submit sufficient evidence to constitute a study or a reasonable basis for the purposes of the qualified immunity doctrine (see also *Leon v New York City Tr. Auth.*, 96 AD3d 554, 554-555 [1st Dept 2012] [memoranda did not constitute study or address risk at issue] and *Sanchez v City of New York*, 85 AD3d 580 [1st Dept 2011]; compare *Schuster,* 263AD2d at 474 [the Appellate Division affirmed the trial court's decision and order to dismiss the complaint, pursuant to CPLR 3212, against the Town of Hempstead and County of Nassau, finding defendants' entitlement to judgment as a matter of law pursuant to the doctrine of qualified immunity based on defendants':

"expert opinion evidence and a survey of and report on the subject intersection by the Division of Traffic Engineering of the Department of Public Works of the County of Nassau. The survey and report, completed in 1986, concluded that neither the installation of a traffic signal nor additional signs at the intersection was warranted. The survey included an on-site inspection, vehicle and pedestrian counts, a listing of warrants issued (including those for automobile accidents) and review by certified engineers. That evidence was sufficient to demonstrate the prima facie entitlement of the Town and the County to judgment as a matter of law pursuant to the doctrine of qualified immunity"

Also compare *Affleck*, 276 AD2d at 508:

"In support of its motion, the County submitted an affidavit by the assistant to the Deputy Commissioner for Traffic Engineering of the County of Nassau, stating that the County had studied the area in question for almost a year in response to citizen complaints, had conducted visits and performed traffic counts in response to the report of PSC Engineering,

and had evaluated accident reports for the general area in making its determination not to install a traffic signal").

In addition, turning to the weight of the testimony of TBTA's Regional Director, "[o]n a motion for summary judgment, ... self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (*Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 631 [2d Dept 2015], quoting *Sacher v. Long Is. Jewish–Hillside Med. Ctr.*, 142 AD2d 567, 568 [2d Dept 1988]).

Accordingly, this is a question of credibility which cannot be decided on a motion for summary judgment (see *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["[i]t is not the court's function on a motion for summary judgment to assess credibility"]; *Moustaffa v City of New York*, 252 AD2d 472, 472 [1st Dept 1998]; see also *Fernandez v VLA Realty, LLC*, 45 AD3d 391, 391 [1st Dept 2007] ["Issues of fact and credibility are not ordinarily determined on a motion for summary judgment"]).

In any event, defendants failed to demonstrate that they complied with MUTCD § 1A.09,[12] which mandates that the decision to use a particular device at a particular location

[12] "**Section 1A.09 Engineering Study and Engineering Judgment**
Support:
01 Definitions of an engineering study and engineering judgment are contained in Section 1A.13.

Standard:
02 **This Manual describes the application of traffic control devices, but shall not be a legal requirement for their installation.**

Guidance:
03 *Early in the processes of location and design of roads and streets, engineers should coordinate such location and design with the design and placement of the traffic control devices to be used with such roads and streets.*

should be made on the basis of either an engineering study or the application of engineering judgment (*see Carson v New York City Tr. Auth.*, 75 Misc 3d 1230(A), 2022 NY Slip Op 50697, *3 [Sup Ct, Kings County 2022]:

> ["While the City established that it had conducted a study of the subject intersection and concluded that a pedestrian traffic signal was warranted at the subject intersection, it did not demonstrate that the decision as to its exact location resulted from a "deliberative decision making process." In particular, Huey, who is not an engineer, decided to change the location of the pedestrian traffic signal without consulting with a licensed engineer. This was in contravention of Section 1A.09 of the MUTCD that the decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment. Rather, Huey based his decision to move the pole location after an electrical inspector informed him that road hardware prevented its placement at the corner. No consideration of the safety/engineering implications of the move appear to have been made. Furthermore, Christopher Hrones' email stating that 'a single pedestrian crossing on either the east or west side of Hudson would probably be sufficient' is inconclusive and does not establish a deliberative decision making process. Finally, the City did not establish that the NYC Dept. Of Transportation, Traffic and Planning Division entertained and passed on the very same question of risk that would go to the jury in this case, namely, the exact location of the pedestrian traffic signal."])"

Based on the foregoing, defendants' motion as to the placement of the delineators is denied.

---

04 *Jurisdictions, or owners of private roads open to public travel, with responsibility for traffic control that do not have engineers on their staffs who are trained and/or experienced in traffic control devices should seek engineering assistance from others, such as the State transportation agency, their county, a nearby large city, or a traffic engineering consultant.*

Support:
05 As part of the Federal-aid Program, each State is required to have a Local Technology Assistance Program (LTAP) and to provide technical assistance to local highway agencies. Requisite technical training in the application of the principles of the MUTCD is available from the State's Local Technology Assistance Program for needed engineering guidance and assistance."
(https://mutcd.fhwa.dot.gov/htm/2009/part1/part1a.htm last visited on May 18, 2023)

VII. Conclusion

Accordingly, it is

ORDERED that the motion of defendant Metropolitan Transportation Authority to dismiss the Complaint herein is granted and the Complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the Complaint is denied; and it is further

ORDERED that the motion of defendants Triborough Bridge and Tunnel Authority and MTA Bridges and Tunnels to dismiss is granted to the extent of granting partial summary judgment in favor of said defendants and against plaintiff as follows: dismissing any claims regarding the color of the pylon(s)/delineator(s)/tubular marker(s) with which plaintiff's motorcycle came into contact and striking any such claims from plaintiff's Bill of Particulars and Supplemental Bill of Particulars; and it is further

ORDERED that the motion of defendants Triborough Bridge and Tunnel Authority and MTA Bridges and Tunnels seeking the dismissal of any claims regarding the placement of the pylon(s)/delineator(s)/tubular marker(s) with which plaintiff's motorcycle came into contact and striking any such claims from plaintiff's Bill of Particulars is denied; and it is further

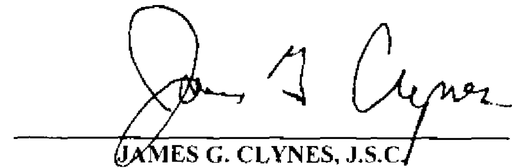
ORDERED that any relief requested and not addressed here is otherwise denied; and it is further

ORDERED that the action shall continue as to the remaining claims; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 103 on June 30, 2023 at 9:30 am; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



6/14/2023
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	